



hc/let/13744

26 August 2002

Senator the Hon P. Cook  
Chair  
Select Committee on a Certain  
Maritime Incident  
The Senate  
Parliament House  
CANBERRA ACT 2600

Dear Senator Cook

#### COMPELLABILITY OF FORMER MINISTERS

The volume of material on this subject has been greatly expanded by the opinions of Professor Lindell and Mr Robertson SC, but not necessarily the clarity of the issue. Uncertainty, which is their bottom line, remains uncertainty when expounded at length.

The question in issue and the possible answers are actually capable of very brief statement. Perhaps I could be allowed to state them again.

The issue is whether, as a matter of law, former ministers who happen to be also former members of the House of Representatives may be compelled to give evidence in a Senate inquiry about their actions *as ministers*.

There is no law on the subject: it is not constitutionally or statutorily prescribed, and there are no cases. The *Egan* judgments are not directly relevant because of the different law under which they were made.

Those who assert the existence of a law have to establish its existence.

It is possible that the courts might find a legal basis for the two relevant matters which have been given parliamentary recognition. They are:

- the two Houses do not summon each other's members
- they do not inquire into each other's proceedings.

Even if the courts were to give legal force to those two principles, would they add them together to make a new legal principle that former ministers who happen to be former members are immune from Senate inquiry into their actions *as ministers*?

My point is simply that the two recognised principles do not add together to make the new one.

It is highly unlikely that a superior court would make that leap.

Whatever is thought of the quality of superior court judges nowadays, they still have a very proper aversion to imposing restrictions on parliamentary processes without a firm basis, and, when confronted with a choice between protecting possible government malfeasance and allowing accountability, they have a very proper tendency to choose the latter.

Yours sincerely

A handwritten signature in blue ink, appearing to read "Harry Evans". The signature is written in a cursive, slightly slanted style.

(Harry Evans)